2010

# Chad Jones v. Farmers Insurance Exchange : Brief of Appellee

Utah Supreme Court


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**IN THE UTAH SUPREME COURT**

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| CHAD JONES,<br><br>Plaintiff/Appellant,<br>vs.<br><br>FARMERS INSURANCE EXCHANGE dba FARMERS INSURANCE COMPANY,<br><br>Defendant/Appellee. | Case No. 20100951 |

# BRIEF OF APPELLEE, FARMERS INSURANCE EXCHANGE

**APPEAL FROM A FINAL JUDGMENT**
**OF THE THIRD JUDICIAL DISTRICT COURT**
**THE HONORABLE MARK S. KOURIS**


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## STATEMENT OF JURISDICTION

Appellee Farmers Insurance Exchange dba Farmers Insurance Company ("Farmers") agrees with the Statement of Jurisdiction in Appellant Chad Jones' principal brief.

## DETERMINATIVE STATUTES OR RULES

There are no constitutional provisions, statutes, ordinances or rules that are determinative of the issue on appeal.

## ISSUE, STANDARD OF REVIEW AND PRESERVATION BELOW

Issue for Review: Was Farmers entitled to debate on the facts the payment of its insured's claim for cracked teeth under the underinsured motorist ("UIM") coverage of the insurance policy when the insured made no report of this injury until four years after the accident, and when he had no credible evidence of causation?

Standard of Review: This Court reviews the trial court's grant of summary judgment for correctness, and it typically does not defer to the trial court's legal conclusions. *Salt Lake City Corp. v. Big Ditch Irrigation Co.*, 2011 UT 33, ¶18. However, because this case involves summary judgment ruling on an insured's bad faith claim, this Court accords "some deference" to the trial court's legal conclusion:

> Whether an insured's claim is fairly debatable under a given set of facts is . . . a question of law. . . . However, because of the complexity and variety of the facts upon which the fairly debatable determination depends, the legal standard under which this determination is made conveys some discretion to trial judges. . . . Therefore, although we will carefully review a trial court's conclusion that an insured's claim is or is not fairly debatable, we will grant the trial court's conclusion some deference.

*Billings v. Union Bankers Insurance Company*, 918 P.2d 461, 464 (Utah 1996).

Preservation Below: The parties raised this issue in their summary judgment briefing. (R. 261-71, 415-23, 548-60, 582-85, 593-604, 637-41).

## STATEMENT OF THE CASE

### A. Nature of the Case, Course of Proceedings, and Disposition Below

Mr. Jones brought this lawsuit in December 2009 against his automobile insurance carrier, Farmers, for bad faith breach of contract, breach of written contract, intentional infliction of emotional distress, and "prima facie tort" after Farmers declined to pay the full policy limits of Mr. Jones' uninsured motorist coverage, $30,000.[1] (R. 1-20). Mr. Jones' cause of action for breach of written contract was nothing more than a reiteration of his cause of action for bad faith breach of contract; he claimed that Farmers "materially breached its contract obligations" by, among other things, "acting in bad faith," "making an unrealistically low settlement offer," and "not fairly evaluating the claim . . . ." (R. 12-15). Judge Kouris dismissed Mr. Jones' cause of action for prima facie tort because it is not a recognized claim for relief in Utah. (R. 376).

In May 2010, Mr. Jones moved for partial summary judgment, apparently on his bad faith claim.[2] (R. 254-71). Farmers responded by opposing his motion and filing its

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[1] Mr. Jones also sued Farmers' claims adjuster, Stephanie Stewart, for the same alleged acts and omissions, but he later agreed to dismiss his claims against her. (R. 1, 137-38).

[2] Mr. Jones did not specify whether he was seeking summary judgment on his remaining claims against Farmers for bad faith breach of contract, breach of written contract, and/or intentional infliction of emotional distress. He asked the trial court for a ruling that as a matter of law (1) Farmers' denial of his claim for dental injuries was not fairly debatable; and (2) Farmers had no good faith basis to deny his claim for dental injuries. (R. 271).

own motion for summary judgment. (R. 398-424). Judge Kouris held oral argument on the parties' motions on September 7, 2010. (R. 675). At the conclusion, he denied Mr. Jones' motion and granted Farmers' motion. (R. 675). This appeal ensued. (R. 679-80).

**B. Statement of Facts**

1. Chad Jones was involved in a car accident on October 11, 2001, that was not his fault. (R. 4, 427-28).

2. He went by ambulance from the accident scene to Alta View Hospital's emergency room. Gold Cross Ambulance's records do not indicate that Mr. Jones suffered face or head trauma in the accident, or that he reported head, face or mouth pain. (R. 430-34). While there is a box on the Medical Assessment Code Sheet for "Head Injury," that box was not checked. "Injured in auto accident" and "Back injury" were checked, and the Notes/Explanation portion of the form indicated that he had "pain in back between shoulder blades." (R. 432).

3. At the emergency room, he complained of left knee pain, neck pain, left elbow pain, and back pain. (R. 437). According to the emergency room records, other than the symptoms above, "[n]o other system complaints are reported." (R. 436-43).

4. Mr. Jones asserts for the first time on appeal that the emergency room records supposedly state he had a "head crack." (Appellant's Brief, p. 9). However, Mr. Jones agreed with Farmers below that nothing in the emergency room records suggests he suffered injury to his head or mouth area. (R. 542). Farmers submits that "head crack" is not a recognized term in medical parlance, and that the correct reading of the handwriting

on the cited page of the emergency room records is "complains of pain upper thoracic area 'heard crack.'" (R. 437).

5. X-rays were taken at the emergency room of Mr. Jones' left knee, ankle and hand. Consistent with the fact that he did not complain of a head injury at the emergency room, no diagnostic studies were performed of his head area. (R. 438-41).

6. Dr. Carolyn Antcil concluded the emergency room report by stating:

> I believe this patient has most likely has[sic] suffered multiple contusions. I have discussed the fact that he may have an occult fracture in his hand or knee or wrist or ankle. . . . I have recommended that he return to the emergency department in four days for repeat evaluation. . . . I have recommended that he return to the emergency department sooner if he is worse.

(R. 442).

7. Mr. Jones saw Dr. Anthony S. Gordon on October 16, 2001. Dr. Gordon detailed Mr. Jones' complaints at the time, and there is no mention of any pain in his head or jaw area:

> At this point, he states there is bilateral kind of tightness in the neck and upper shoulder area. His left wrist is feeling much better but a little discomfort over the ulnar aspect of the wrist. The knee is not bothering him that much. His ankle hurts over the anterolateral aspect of the left ankle. He's also noted some right heel pain.

(R. 445).

8. Notably missing from Dr. Gordon's detailed evaluation is any statement that Mr. Jones reported issues with or suffered an injury to his head or jaw area. (R. 445-46).

9. Mr. Jones filled out a "pain diagram" after the accident as part of his medical care. Mr. Jones did not indicate in this pain diagram that he had any pain in his head or mouth. (R. 448). While Mr. Jones conceded this below (R. 543), he now contends for the first time on appeal that he drew a circle "around the affected areas including the jaw." (Appellant's Brief, p. 9). Whether the circle he drew encompassed the jaw area is questionable, but there is no question that the pain descriptors he drew on the diagram stop at the neck area, and there are no pain descriptors in what he is now calling the jaw area. (R. 448).

10. On January 9, 2002, Mr. Jones submitted an Application for Benefits and Proof of Loss to Farmers. In his Application, he described his injury as "broken tip of ulna bone left at wrist, injured left thumb, twisted left ankle, tendon and bone damage, bumps & bruises." (R. 543). He did not state in the Application that he had injured his face, teeth or mouth in the accident. (R. 451-53, 544). Mr. Jones received full PIP benefits of $6,250 from Farmers. (R. 469).

11. Mr. Jones continued to seek medical treatment from Dr. Gordon and others through 2002, but the medical records from these providers do not state that Mr. Jones reported pain or injury to his mouth or teeth.

12. Mr. Jones visited a dentist, Dr. Richard Hughes, on September 14, 2005, four years after the accident. At that time, Dr. Hughes diagnosed Jones with six tooth fractures. (R. 544).

13. Dr. Hughes does not have records of Mr. Jones visiting his offices at any time before September 14, 2005. (R. 544). No medical records were provided to

Farmers showing that Mr. Jones visited any other dentist from the date of the accident to September 14, 2005. (R. 544-45).

14. After visiting Dr. Hughes, Mr. Jones claimed to Farmers for the first time that his broken teeth were caused by the accident years before. (R. 544).

15. Mr. Jones received the $25,000 limits of the at-fault driver's liability insurance policy from Allstate Insurance Company in approximately September 2005. (R. 543).

16. Mr. Jones then demanded the full limits of the UIM policy, $30,000, from Farmers in approximately September 2005. (R. 346, 545).

17. A Farmers adjuster immediately contacted Mr. Jones to interview him about his claimed injuries from the accident and to explain his UIM coverage. (R. 341, 344). Mr. Jones told the adjuster that he had "sustained a sprained left ankle, bruised left wrist and thumb, fractured tip of ulna which has been surgically repaired, teeth damage (cracked)-yet to be repaired." Mr. Jones also reported to the adjuster that his medical bills were approximately $30,000. The adjuster, not having seen the medical records showing he had not been treated for cracked teeth until September 2005, noted that she would need to gather his medical bills and reports, and that it would be a UIM limits case "[i]f injuries and specials are as insured states they are." (R. 341).

18. Farmers requested records from Mr. Jones' medical providers who had treated him for injuries allegedly related to the accident, including Dr. Hughes.[3] Farmers

[3] Because Farmers had not received records from Dr. Hughes by November 16, 2005, Farmers contacted Mr. Jones about this, and he told Farmers he could call the medical

received the records from Dr. Hughes' office in late January 2006. (R. 330). Only at this point did the Farmers adjuster learn that Mr. Jones had not sought treatment from Dr. Hughes until years after the accident. (R. 330).

19. Dr. Hughes noted in a September 21, 2005 record that Mr. Jones had six fractured teeth, and that several of these fractures were large. (R. 455). Dr. Hughes commented that "[t]hese fractures *could have* been caused by traumatic force. *It was reported by the patient* that he was in an automobile accident 4 years ago *and injured his mouth.*" (R. 455, emphasis added). Thus, Dr. Hughes identified traumatic force in general as a possible cause of his teeth fractures. It is clear from this record that Mr. Jones told Dr. Hughes that he injured his mouth in the automobile accident, something that he never told any of his prior medical providers who treated him for injuries related to the accident.

20. Dr. Hughes further reported in this record that Mr. Jones told him "[h]e was aware that he had broken his tooth but was involved with several medical procedures that took precedence." (R. 455). There is no documentation of Mr. Jones ever remarking to Allstate or to any medical provider in the years after the accident that he knew he had broken a tooth in the accident.

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providers to remind them to send the records. (R. 335). Farmers called Dr. Hughes' office on December 6, 2005, because it still had not received his records. Dr. Hughes' office replied that it had not received Farmers' request for records, so Farmers resent it via facsimile that day. (R. 332). Farmers still had not received the records by January 10, 2006, so Farmers again contacted Dr. Hughes' office and asked for the records. (R. 331).

21. On January 23, 2006, Farmers sent Dr. Hughes a letter stating that "[y]our report indicates that you saw Mr. Jones on 9/14/2005 nearly four years after this loss occurred which obviously leads us to question causation. The purpose of this letter is to get your professional opinion on the cause of Mr. Jones[sic] teeth damage . . . ." (R. 460).

22. Dr. Hughes finally responded to Farmers' inquiry on April 20, 2006. (R. 325). He merely commented that "the teeth were cracked during the accident and are still cracked requiring the same treatment regardless of the time frame." (R. 325). He estimated the cost for the recommended treatment at $14,000. (R. 325).

23. Dr. Hughes did not offer any explanation for why he felt Mr. Jones' teeth were cracked during the accident beyond what was in his September 21, 2005 record, which was that Mr. Jones had told him during that visit that he hurt his mouth in the accident. (R. 325).

24. After repeated requests, Farmers received all records of Mr. Jones' medical treatment and medical expenses it had requested by May 15, 2006. (R. 320). That same day, Farmers roundtabled the UIM claim. The adjuster's notes from the roundtable reason that

> [w]e have no support, other than the insureds[sic] statement, that the damage to his teeth resulted from the loss. Insured makes no mention of his teeth until he sees the dentist 4 years after the accident; there is no facial trauma noted in the ER report, Dr. Gordon's report or the PT [physical therapy] reports. His mouth problems could just have likely been caused by something other than his accident, and we don't have enough support to include the $14,000 in future treatment. Will evaluate without.

(R. 320).

25. Farmers determined it would offer Mr. Jones $5,000 for his UIM claim. Farmers considered that Mr. Jones had outstanding medical bills of $7,635.26 and that he had received $25,000 from Allstate, leaving him with over $17,000 in compensation for general damages. Farmers noted that Mr. Jones might need a minor operation in the future for his thumb, but if he did, the cost would be minimal. (R.319). Farmers' adjuster concluded that

> [w]e are not allowing the tooth damage as we don't have sufficient proof that it was caused by the accident. I think the underlying limit pretty much compensates insured for his injuries but I am going to offer $5,000 on the UIM, will explain that this does not include the teeth damage.[4]

(R. 319).

26. Farmers communicated the offer to Mr. Jones on May 19, 2006 and notified him of his right to arbitrate the UIM claim. (R. 318). After Farmers repeatedly attempted to contact Mr. Jones to find out his response, Mr. Jones told Farmers on September 11, 2006 that he would be retaining an attorney to "get policy limits." (R.

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[4] The Farmers adjuster also pointed out that "I would have expected multiple fractured teeth to cause some pain or discomfort during the 4 years. ie [sic] cold drinks, chewing, etc. In addition, the ER report mention[s] the other injuries, but does not even mention a blow to the head, facial bruise, contusion or anything like it. Nor does the [claimant] mention a bump or blow to the head or face during the ER visit. I cannot see how the dental damage is causally related to our loss." (R. 317).

311-17). Mr. Jones never reduced his demand and always insisted on nothing less than the full policy limits.[5] (R. 279, 285).

27. In preparation for the arbitration, Farmers retained a dentist, Dr. Richard Elggren, who opined that the accident did not cause Mr. Jones' teeth damage. Dr. Elggren pointed out that "causation to the accident cannot be concluded based on the four-year gap to initiating treatment, coupled with lack of reported trauma to the mouth and head in any record after the accident." (R. 469). Dr. Elggren identified other incidents that could have caused his teeth damage, including a wrestling injury where Mr. Jones suffered a blow to the head, a fall in the shower with a laceration to his head, or a rollover vehicular accident in which he experienced side-to-side head movement. (R. 469).

28. Paul Matthews, a member of the three-person arbitration panel, e-mailed counsel for Farmers and Edward Wells an arbitration award dated December 17, 2009. (R. 471). Although Mr. Jones characterizes this award as a "draft" award, it is not labeled as such. (R. 471-72).

29. The arbitration panel addressed his injuries from the accident in Paragraph 2 of the letter, as follows:

> His left ankle, his neck and back and wrist were all injured. . . . He was seen at the Alta View Hospital for examination and treatment for his head, neck, back, left wrist and left knee.

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[5] Thus, Mr. Jones' assertion that "[s]hortly before the statute of limitations would expire, Jones made one last attempt [on August 25, 2008] to get Farmers to offer more than the $5,000," is somewhat misleading. (Appellant's Brief, p. 11). Mr. Jones made one last attempt to get Farmers to offer the full policy limits on this date. (R.279).

> The evidence does not preponderate that the plaintiff hit his jaw or damaged his teeth in the accident.

(R. 471).

30. The arbitration panel then described his lingering problems from the accident as left wrist and back problems but did not state that he had existing teeth problems from the accident. (R. 472).

31. The arbitration panel awarded $18,500, which amount is approximately midway between Farmers' offer of $5,000 and Mr. Jones' demand of $30,000. (R. 472).

32. The arbitration panel sent another award letter to counsel on December 21, 2009. Like the December 17, 2009 award, the arbitrators did not sign this version, either. (R. 475). The panel did not explain in the December 21 version why it was sending another award letter. (R. 474-75). The only difference between the two award letters is that the words "damaged his teeth" are not in the December 21, 2009 version. However, Paragraph 2 still lists his injuries from the accident and leaves teeth damage off that list, since "[t]he evidence does not preponderate that the plaintiff hit his jaw in the accident." (R. 474).

33. Farmers timely satisfied the arbitrators' award. (R. 477).

34. The day after the arbitration panel issued the December 17, 2009 award and before receiving what he calls the panel's "final" award, Mr. Jones filed his lawsuit against Farmers. (R. 1-22).

35. Mr. Jones moved for partial summary judgment on May 26, 2010. (R. 254). In his motion, Mr. Jones did not argue (as he does now on appeal) that Farmers had

committed bad faith by not adjusting his UIM claim in a timely manner, by treating him as a layperson, by "lowballing him," or by allegedly forcing him into arbitration. (R. 254-71). Rather, Mr. Jones contended that "once a Plaintiff presents an expert opinion from a medical or dental expert linking a claimed injury to an accident, that absent a contrary opinion from a medical or dental expert, the question of whether or not the injury occurred in the accident is not 'fairly debatable.'" (R. 254-71, 551). He asked the trial judge to rule as a matter of law that (1) when Farmers denied his claim for dental injuries, his claim was not "fairly debatable"; and (2) Farmers had no good faith basis for denying his claim for dental injuries. (R. 271).

36. Farmers opposed the motion and filed its own motion for summary judgment. (R. 398-424). Out of the thirty three paragraphs of undisputed facts set forth by Farmers, Mr. Jones only disputed two paragraphs in which Farmers pointed out that Mr. Jones had told Dr. Hughes that he injured his mouth in the accident (R. 589), and three paragraphs in which Farmers distinguished between the December 17 and December 21, 2009 arbitration awards. (R. 590-92).

37. Judge Kouris heard oral argument on the parties' motions for summary judgment on September 7, 2010. (R. 686). Judge Kouris appeared to factor Mr. Jones' unprecedented statement to Dr. Hughes that he had sustained a mouth injury in the accident into his decision. He noted that Dr. Hughes said that the accident caused the teeth damage only because Dr. Hughes was "working under the premise that . . . [Mr. Jones] sustained a mouth injury in that accident." (R. 686, p. 38). When Mr. Jones' lawyer admitted Mr. Jones had told Dr. Hughes he sustained a "mouth injury" in the

accident, Judge Kouris responded, "Well, I think if you give me that, I think that destroys your case." (R. 686, p. 38).

38. Judge Kouris pointed out that Farmers was entitled to question Mr. Jones' credibility in telling Dr. Hughes that he hurt his mouth in the accident when he had never mentioned this to a medical provider before:

> The problem is, if he says, "I sustained a mouth injury, " your client [Mr. Jones] is the one now putting a sharp point on exactly what happened, and now I think you've made the issue fairly debatable, because you've moved it out of the medical realm, and instead you've put it on a credibility realm with regard to your client.
>
> The fact that he had gone through all of these other medical issues and never mentioned his mouth, and now all of a sudden once he learns that his teeth are broken, he invents some sort of a mouth injury, I think at that point in time they [Farmers] can look at that and say, "Hold the phone here."

(R. 686, p. 48).

39. The trial court granted Farmers' motion for summary judgment and denied Mr. Jones' motion for summary judgment.[6] (R. 676-77).

## SUMMARY OF ARGUMENT

POINT A: Farmers did not commit bad faith as a matter of law in failing to pay UIM policy limits. It was fairly debatable whether Mr. Jones' teeth damage, first reported by Mr. Jones and first identified by Dr. Hughes four years after the accident, was caused by the accident. Mr. Jones had the burden of proving to the trial court, based on the facts

[6] If a claim is fairly debatable, there is no basis for a claim for intentional infliction of emotional distress. *Callioux v. Progressive Insurance Co.*, 745 P.2d 838, 843 (Utah Ct. App. 1987).

available to Farmers at the time it extended the offer to Mr. Jones, that it was unreasonable for Farmers to question his claim that the accident caused the teeth damage. Far from meeting that burden, the "evidence" Mr. Jones touts as the unquestionable and ironclad proof that the teeth damage was caused by the accident is Dr. Hughes' statement to Farmers that it was -- yet Dr. Hughes' statement was based entirely on Mr. Jones misrepresenting to Dr. Hughes that he hurt his mouth in the accident and that he "knew" he had broken a tooth in the accident but just did not bother to report it to anyone or to seek treatment for it before seeing Dr. Hughes.

Events after Farmers extended the offer to Mr. Jones vindicate Farmers' evaluation. Dentist Richard Elggren opined that the teeth damage could not have been caused by the accident due to the fact that Mr. Jones reported no mouth pain for four years after the accident. The arbitration panel similarly concluded that Mr. Jones was not entitled to an award for teeth damage because "the evidence does not preponderate that he hit his jaw" in the accident. Given that a dentist and a three-lawyer arbitration panel agreed with Farmers' assessment that the accident did not cause his teeth damage, Farmers did not commit bad faith by debating the claim.

POINT B: By asking this Court to "clarify" whether the fairly debatable doctrine trumps what he terms "an insurer's *Beck* duties," Mr. Jones improperly attempts to expand the scope of this case beyond its facts. Mr. Jones contends that an insurer can still commit bad faith even if the insured's claim was fairly debatable, and he asks this Court to create new law to this effect. He offers hypothetical situations of an insurance company fairly

debating a claim but mistreating its insured in other ways, yet these hypotheticals have nothing to do with Farmers' treatment of Mr. Jones and his UIM claim.

Mr. Jones argued below that Farmers committed bad faith only by failing to pay the UIM limits to him. He did not offer evidence that Farmers took too long in assessing his claim or did not treat him like a layperson in explaining the claim, nor did he make and develop arguments that Farmers mistreated him in these ways. This appeal is not the place for this Court to "clarify" issues that Mr. Jones thinks need to be clarified but did not present to the trial court.

## ARGUMENT

### I. UTAH LAW ON THE FAIRLY DEBATABLE DOCTRINE DOES NOT NEED CLARIFICATION.

Contrary to Mr. Jones' assertion that there are issues regarding the "fairly debatable" doctrine that need clarification, Utah law on this doctrine is simple and straightforward. It is clear that an insurer cannot commit bad faith if it denies an insured's claim that is fairly debatable. *Billings v. Union Bankers Ins. Co.*, 918 P.2d at 465. This Court determined in *Billings* that the fairly debatable defense is a complete defense to a bad faith claim. While an insurer has a duty to diligently investigate the facts, fairly evaluate the insured's claim, and act promptly and reasonably in rejecting or settling the claim, the "overriding requirement" of an insurer is to "act reasonably, as an objective matter, in dealing with their insureds." *Id.* at 465. Consistent with this overall approach, "when an insured's claim is fairly debatable, the insurer is entitled to debate it and cannot be held to have breached the implied covenant if it chooses to do so." *Id.* at

465.[7] This Court later confirmed that the fairly debatable defense constitutes a complete defense to a bad faith claim brought by an insured in *Saleh v. Farmers Ins. Exchange*, 2006 UT 20, 133 P.3d 428, ¶24 (Utah 2006), stating that "[i]f a claim brought by an insured against an insurer is fairly debatable, failure to comply with the insured's demands cannot form the basis of bad faith." *See also* *Billings*, 918 P.2d at 465 (explaining that "[i]t would not comport with our ideas of either law or justice to prevent any party who entertains bona fide questions about his legal obligations" to deny an insured's claim, *quoting* *Western Cas. & Sur. Co. v. Marchant*, 615 P.2d 423, 427 (Utah 1980)).

Utah law is also clear that a claim is fairly debatable "[i]f the evidence presented creates a factual issue as to the claim's validity . . . ." *Callioux*, 745 P.2d at 842 (holding that insurer was entitled to suspect insured's claim for loss of vehicle in fire because county attorney charged insured with arson and the trial court found probable cause, even though jury returned verdict of not guilty). An insurer has a debatable reason to deny a claim if there is "an arguable reason, a reason that is open to dispute or question." *Prince v. Bear River Mutual Ins. Co.*, 2002 UT 68, 56 P.3d 524, ¶¶34-5 (granting summary judgment to an insurer who had a legitimate factual reason for denying the insured's

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[7] Thus, this Court has already addressed the question raised by Mr. Jones of whether "the 'fairly debatable' doctrine trumps an insurer's *Beck* duties." (Appellant's Brief, p. 16). The doctrine coexists with these duties. This Court noted that the "overriding requirement" imposed by these duties is that "insurers act reasonably, in an objective manner, in dealing with their insureds." *Billings*, 918 P.2d at 465. This Court concluded that it is "entirely consistent" with this requirement for an insurer with "bona fide questions" about an insurer's claim to debate it without facing liability for bad faith. *Id.* at 465.

claim for PIP benefits). Thus, if there is a triable issue of fact as to whether the insured was entitled to benefits, the insurer cannot be liable for bad faith as a matter of law. *See* Callioux, 745 P.2d at 842 (*citing* Indiana case with approval in which an insurer escaped liability for bad faith because there was a triable issue of fact regarding whether the loss occurred due to arson).

Put another way, if an insured cannot establish that it is entitled to summary judgment on the merits of his claim, that means the claim is fairly debatable:

> Unless the trial court is prepared to grant a directed verdict to the insured on his claim under the policy and to hold that reasonable minds could not disagree as to the insured's entitlement to proceeds under the policy, it follows that reasonable minds could disagree about the insured's entitlement to policy proceeds. Therefore, the insurer should be entitled to a directed verdict in its favor on the insured's bad faith claim unless the insured is entitled to a directed verdict in his favor on the policy claim.

Stephen S. Ashley, *Bad Faith Actions Liability & Damages* Sec. 5.04 at 5-17 to 5-18 (2d ed. 1997). Mr. Jones complains that this standard "acts as a *de* facto bar to nearly all bad faith claims." (Appellant's Brief, p. 14). To the contrary, this standard acts as a safeguard against an insurer facing bad faith exposure every time it denies a claim later determined to be valid. If an insurer denies a claim when there is no reasonable debate as to the insured's entitlement to the insurance proceeds, then the insurer has breached the covenant of good faith and fair dealing, and the insured has a viable claim for bad faith.

## II. FARMERS DID NOT ACT IN BAD FAITH AS A MATTER OF LAW BECAUSE ITS POSITION ON MR. JONES' CLAIM FOR TEETH DAMAGE WAS FAIRLY DEBATABLE WHEN IT EVALUATED HIS CLAIM.

Mr. Jones devotes the majority of his principal brief to imagining situations, none of which exist here, in which he perceives it as unfair for an insurer to escape bad faith liability merely because the claim was fairly debatable. Mr. Jones does not present argument on the proper issue for this Court's review, whether Farmers committed bad faith in denying his claim for teeth damage, until late in his brief. (Appellant's Brief, pp. 29-31).

His argument focuses on the supposed strength of Dr. Hughes' opinion that the accident caused the teeth damage. He acknowledges that Dr. Hughes submitted an initial record to Farmers "that appeared equivocal as to causation, and could be interpreted as though Dr. Hughes' opinions were based solely on Jones' report [that he injured his mouth in the accident]." (Appellant's Brief, p. 29). However, Mr. Jones contends that when Dr. Hughes responded to Farmers' request for more information on causation with the dismissive statement that "the teeth were cracked in the accident and are still cracked requiring the same treatment regardless of time frame," Farmers committed bad faith because it did not accept that statement as unassailable proof of causation. At this point, Mr. Jones contends, it was incumbent upon Farmers to do "additional investigation," such as obtaining an opposing medical opinion, thereby dragging out indefinitely an evaluation of his teeth damage claim that Farmers was obliged to complete promptly. To complete a good faith evaluation, "an insurance company simply must show that it

conducted a review or investigation sufficiently thorough to yield a reasonable foundation for its action." *Grammenos v. Allstate Ins. Co.*, 2009 WL 1152164 at *5 (E.D. Pa. 2009), *quoting* *Cantor v. The Equitable Life Assurance Society of the United States*, 1999 WL 219786 at *3 (E.D. Pa. 1999). "Once an insurer's investigation [has] revealed evidence sufficient to sustain a denial of the claim, the insurer has no obligation to investigate beyond that point." *Bad Faith Actions*, Sec. 5:8 at 57 (2d ed. Supp. 2004).

Mr. Jones did not have reliable or credible evidence that the accident caused his teeth damage, and Farmers was entitled to question it. Dr. Hughes initially said that the teeth damage "could have been caused by traumatic force." Pressed by Farmers to elaborate on whether the accident (as opposed to any other traumatic force) caused the teeth damage, he merely answered that "the accident caused the teeth damage," with no explanation for his statement. Moreover, Dr. Hughes' statements were based on Mr. Jones misrepresenting to him that he had hurt his mouth in the accident and knew he had broken a tooth in the accident. The reliable evidence that Farmers did have pertaining to his claim consisted of four years of medical records in which there is no mention that Mr. Jones hurt his mouth or knew he had broken a tooth in the accident.

### A. An Insurer Can Reasonably and Fairly Question a Claimant's Statements.

As part of its evaluation of Mr. Jones' demand for the UIM policy limits, Farmers examined all medical records detailing what Mr. Jones' injuries were from the accident. Mr. Jones reported specific injuries to his left ankle, neck, back and wrist to the paramedics and/or emergency room personnel. He did not hit his head during the

collision. He did not report any injuries to his mouth, head or teeth at the accident scene, while being transported to the hospital via ambulance, or at the emergency room. As he received treatment for his reported injuries in the ensuing months, he never told any medical provider that he injured his mouth, head or teeth in the accident. He never told Allstate, when he was seeking its policy limits; or Farmers, when he applied for PIP benefits, that he had sustained such injury. Four years later, he showed up at a dentist's office with six cracked teeth and told the dentist he hurt his mouth in the accident and knew at that time that he had broken a tooth. Farmers was understandably suspicious that Mr. Jones could have lived with six cracked teeth for four years without seeking treatment, and that he waited four years to tell anyone about this injury.

It was therefore reasonable for Farmers to determine that his remark to Dr. Hughes that he hurt his mouth in the accident and knew he broke a tooth lacked credibility. Farmers rationally deferred to statements made immediately after the accident and during the course of many months of treatment for other injuries that he was careful to report to doctors. Farmers reasonably concluded that if Mr. Jones had actually hurt his mouth during the accident or had actually known he broke a tooth, he would have reported it to someone sooner. It was therefore legitimate for Farmers to doubt the factual basis for Dr. Hughes' conclusory statement that the accident caused the teeth damage.

### B. It is Appropriate for an Insurer to Balance a Doctor's Speculation Against Logic.

Dr. Hughes' reports did not give Farmers reason to relax its suspicion. His first report equivocally stated that Mr. Jones' cracked teeth "could have been caused by

traumatic force." An expert opinion based on speculation or conjecture invites skepticism. *Thurston v. Workers Comp. Fund of Utah*, 2003 UT App 438, 83 P.3d 391 ¶20. Dr. Hughes did not say that the accident caused the teeth damage but commented that Mr. Jones told him he hurt his mouth in an accident four years ago and knew he broke a tooth at that point. Farmers asked Dr. Hughes to elaborate on the broad statement in his first report, explaining that it was questioning causation due to the fact that Mr. Jones had not claimed teeth damage from the accident before. Dr. Hughes' flippant reply three months later was that the teeth "were cracked during the accident and are still cracked . . . ."

Farmers was not compelled to accept this bald statement at face value merely because it came from a dentist. *See McIlravy v. North River Ins. Co.*, 653 N.W.2d 323, 332 (Iowa 2003) (criticizing doctor's opinion that injury was "work-related"; while expressed "with a high degree of certainty," it did not include reasons or explanations to support the opinion and therefore gave the insurer cause to question it); *State Farm Lloyds, Inc. v. Polasek*, 847 S.W.2d 279, 286 (Tex. App. 1992) (noting that whether insurer had reasonable basis to deny claim "cannot be resolved by looking at the insured's evidence and deciding that the insurer should have believed it instead of other evidence.") Jurors are instructed in Utah that they are not required to believe an expert witness' opinion but should give the opinion the weight they think it deserves. *MUJI 2d CV 129; see also State v. Lafferty*, 2001 UT 19, 20 P.3d 342 ¶49 (stating that an expert opinion that lacks sufficient analysis and detail to support the opinion can be rejected). This principle applies with equal force to insurers evaluating an insured's claim for

benefits. In *Jones v. Liberty Mutual Ins. Co.*, 2009 WL 425023 (W.D. Ky.), the insured's chief complaint at the accident scene was a head injury, described in the ambulance record as a bump on the head. After receiving the at-fault driver's policy limits, he then claimed a brain injury and sought UIM limits from his carrier. Although two treating doctors diagnosed the insured with a brain injury, the insurer declined to pay policy limits, viewing his injury as a "run-of-the-mill soft tissue injury . . . ." *Jones*, 2009 WL 425023 at *5. Rejecting the insured's bad faith claim, the court explained that

> [t]here is no authority the insurer must accept the care and diagnosis of a treating physician at face value and forego scrutiny if the basis and reliability of the diagnosis is susceptible to question. . . . Skepticism is reasonable for an insurer called upon to pay policy limits in an area of injury where diagnosis may be uncertain, i.e., "fairly debatable."

*Id.* at *5.

The court in *Sullivan v. Allstate Ins. Co.*, 2010 WL 3323726 (D. Vt.) similarly dismissed an insured's bad faith claim for failure to pay UIM limits even though the insured furnished a doctor's report that she had continued jaw pain two years after the accident that could require future surgery. The court determined that the insurer fairly questioned the value of her claim because the doctor did not emphatically state she needed future surgery and admitted that her long term prognosis was difficult to assess. "Because she has not established her entitlement . . . to the amounts she claims Allstate failed to provide, the nature and extent of her claims remain 'fairly debatable' and bad faith does not exist as a matter of law." *Sullivan*, 2010 WL 3323726 at *9.

Far from serving as unquestionable proof of causation, Dr. Hughes' blanket statement was based wholly on Mr. Jones telling him something that was highly questionable –that he had hurt his mouth in the accident and knew at the time that he had broken a tooth. Farmers understandably suspected the legitimacy of that statement.

### C. Farmers Was Not Required to Hire Its Own Medical Expert to Point Out the Obvious.

Requiring insurers to spend thousands of dollars on hiring a medical expert every time an insured produces a doctor's opinion, no matter how suspect, would not promote accurate and timely evaluation of claims. This is particularly the case here, where the circumstances surrounding Mr. Jones' claim made the evaluation dependent upon credibility, not upon medical expertise. Dr. Hughes only connected the accident to the teeth damage through Mr. Jones' unprecedented, self-serving remark that he had hurt his mouth in the accident and knew he broke a tooth. A medical doctor is not needed to point out the insufficiency of that connection.

There is no requirement under Utah law that Farmers obtain an expert medical opinion in order to evaluate Mr. Jones' claim. Instead, an insurer may refute the shaky opinion of a doctor with logic and common sense. In *Trujillo v. American Family Mutual Ins. Co.*, 2010 WL 1901774 (D. Utah), an insured was in a car accident and was diagnosed with back problems and a broken hip. After her hip healed, she returned to work. Less than a month after returning to work, she complained of hip pain again and was assigned a 17% impairment rating. After collecting from the tortfeasor, the insured made a UIM claim based on lost wages and her impairment rating. The insurer referred

the claim to its Medical Services Department, where one of its nurses examined the medical records and determined that her claim was questionable. The insurer did not seek review of this evaluation by any outside medical doctor. After the insurer denied the insured's claim, it was sued for bad faith.

Judge Ted Stewart granted summary judgment on the bad faith claim, rejecting the insured's contention that the nurse was not qualified to evaluate the UIM claim. The court concluded that the claim could rationally be denied based solely on the nurse's review of what was in the medical records. *Trujillo*, 2010 WL at *4; *see also* *Bellville v. Farm Bureau Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005) (observing that a claim is fairly debatable "when it is open to dispute on any logical basis.")

Farmers had a legitimate basis to reject Mr. Jones' demand for UIM policy limits. The only "evidence" he offered that the accident caused the teeth damage was his dentist's conclusory statement, which statement was based on the false premise that Mr. Jones hurt his mouth in the accident. "[I]f the evidence presented creates a factual issue as to the claim's validity, there exists a debatable reason for denial . . . eliminating the bad faith claim." *Prince v. Bear River Mut. Ins. Co.*, 2002 UT 68, 56 P.3d 524 ¶34.

## III. DR. ELGGREN'S REPORT AND THE ARBITATION AWARD VINDICATE FARMERS' POSITION.

So long as there was a fairly debatable reason for Farmers to deny Mr. Jones' demand for policy limits, it was entitled to summary judgment on the bad faith claim. Events after Farmers' rejection of Mr. Jones' policy limits demand show that there was not only a fairly debatable reason, but that there was a well-accepted reason.

In preparation for the arbitration, Farmers hired a dentist, Dr. Richard Elggren, to opine on causation. Dr. Elggren determined that the teeth damage was not caused by the accident. In contrast to Dr. Hughes' blanket statement on causation, Dr. Elggren explained that the four-year gap between the accident and seeking treatment for the fractures meant that some other trauma must have caused the damage, and he cited other instances of trauma Mr. Jones had suffered that could have been the cause. Although Farmers reached its decision to deny Mr. Jones' claim before hiring Dr. Elggren, his opinion on causation indicates that even if Farmers had sought an expert opinion during its evaluation (as Mr. Jones contends Farmers should have), the outcome would not have been any different. Farmers still would have denied the claim.[8]

The arbitration panel's decision and award also validates Farmers' evaluation of Mr. Jones' claim. As an initial matter, the arbitration panel clearly would not agree with Mr. Jones' argument that Farmers committed bad faith by not awarding him policy limits of $30,000. The award was for $18,500. That is approximately midway between Farmers' offer of $5,000 and the policy limits.

Moreover, none of that award was for Mr. Jones' teeth damage. While Mr. Jones contends that it is unclear what the award was for because there are two versions of the

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[8] Moreover, had Farmers obtained Dr. Elggren's opinion before rejecting Mr. Jones' claim, that still would not have been enough to satisfy Mr. Jones. He attached an affidavit from yet another dentist, Richard Hauley, to his Reply Memorandum in Support of his Motion for Summary Judgment. (R. 538-540). Nonetheless, it is not the law in Utah that an insurer must engage in a never-ending battle of experts to escape liability for bad faith. Such a battle would create needless expense for both insurer and insured. It would also indeterminately prolong an insurer's evaluation of an insured's claim, in contravention of the insurer's duty to investigate a claim promptly.

written decision, the difference between the two versions is immaterial. In both versions, the panel includes a paragraph about what Mr. Jones' injuries were from the accident. The panel notes that the injuries were to his left ankle, his neck, back and wrist; that he was treated at the emergency room for these injuries; and that he had surgery on his left wrist shortly after the accident. (R. 471, 474). Both versions of the paragraph conclude with the statement that "[t]he evidence does not preponderate that the plaintiff hit his jaw" in the accident. (R. 471, 474). While the first version continues that sentence with the words "or damaged his teeth," both versions explicitly reject the premise behind Mr. Jones' teeth damage claim, the notion that he hit his jaw in the accident.

The next paragraph of both versions of the award discusses Mr. Jones' lingering complaints that the panel views as valid, and which complaints provide the justification for the arbitration panel's $18,500 award. This paragraph describes his continuing problems with his left wrist and back pain, but it does not list teeth damage as a current problem attributable to the accident.[9] (R. 472, 475).

Even if an arbitration panel had issued an award for $30,000, and had explicitly stated the amount was to compensate Mr. Jones for teeth damage caused by the accident, that would not mean that Farmers committed bad faith. Again, as long as Farmers had a fairly debatable ground for denying his claim, it was not liable for bad faith. Considering

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[9] Paragraph 5 of both versions of the panel's decision is somewhat vague. (R. 472, 475). The panel states that Dr. Elggren deferred to Dr. Hughes regarding causation and damages. Dr. Elggren did not dispute Dr. Hughes' estimate that the cost to repair Mr. Jones' teeth was approximately $14,000. While he disagreed with Dr. Hughes' statement that the accident caused the teeth damage, he agreed with Dr. Hughes as to general causation—i.e., both dentists agreed that trauma would cause the teeth damage.

that the arbitrators in this case flatly rejected his contention that he hurt his jaw in the accident, Farmers had more than a fairly debatable ground.

Courts in other jurisdictions have granted summary judgment to insurers facing bad faith lawsuits when arbitrators rule in favor of the insured on claims questions, but in an amount less than what the insured demanded. The Rhode Island Supreme Court has held that the issue of liability for an accident is "clearly debatable" even when an arbitrator has found an insured was only 25% at fault. *Asermely v. Allstate Ins. Co.*, 728 A.2d 461, 464 (R.I. 1999). A ruling in favor of an insurer logically implies that the insurer's position was at least fairly debatable. *Behnke v. State Farm Gen'l. Ins. Co.*, 196 Cal. App. 4th 1443 (2011) (holding that insurer could not be liable in bad faith over reasonableness of insured's attorney fees when dispute was submitted to arbitration and award was less than insured's claim); *Endo Surgical Center v. Allstate New Jersey Ins. Co.*, 2009 WL 4877155 (N.J. Super. 2009) (stating that an arbitrator's award to insured for approximately one third of what its demand was "clearly" meant the insurer had not committed bad faith in refusing to pay claim).

Mr. Jones faults Farmers with bad faith on appeal for not "obtaining an opposing medical opinion" before rejecting his policy limits demand. (Appellant's Brief, p. 30). Had Farmers obtained Dr. Elggren's report at that point, it certainly would have cemented what was already fairly debatable. Nonetheless, Farmers was not required to garner enough evidence to eliminate any question as to causation. Even after seeing Dr. Elggren's report, Mr. Jones still sued Farmers for bad faith, suggesting that Mr. Jones' real argument on appeal is that an insurer must leave no stone unturned, and must

undertake every conceivable expense in evaluating a claim, before it can say that it had a legitimate reason to deny the claim. That untenable standard rises far higher than what Utah law requires. The fact that a three-member arbitration panel agreed with Farmers that the teeth damage was not caused by the accident only underscores the legitimacy of Farmers' position.

## IV. THIS APPEAL IS NOT THE APPROPRIATE AVENUE TO ASK FOR NEW LAW EXPANDING WHEN AN INSURER CAN BE LIABLE IN BAD FAITH.

### A. Mr. Jones Contended Below That Farmers Committed Bad Faith Only by Failing to Pay Policy Limits on His Teeth Damage Claim.

Mr. Jones originally sued Farmers for bad faith for a variety of alleged reasons ranging from not evaluating the claim fairly to forcing him into arbitration, from making material misrepresentations of fact regarding its evaluation to try to intimidate and scare him into accepting a low offer. (R. 1-22). Mr. Jones did not conduct discovery or develop evidence to support his claims that he was forced into arbitration or that Farmers did not investigate his claim promptly, and he cannot raise them now. When Mr. Jones moved for summary judgment shortly after filing his Complaint, he therefore narrowed the bad faith claim to contending that Farmers committed bad faith by not paying policy limits on his teeth damage claim. He moved for summary judgment on two enumerated bases:

> (1) As a matter of law, when Defendant denied plaintiff's claim to dental injuries . . . Plaintiff's claim of dental injuries was not "fairly debatable;" and

(2) As a matter of law, Defendant had no good faith basis for denying Plaintiff's claim that the dental injuries discovered in 2005 resulted from injuries received in the . . . collision. (R. 263).

Thus, the gravamen of Mr. Jones' bad faith claim has been that Farmers committed bad faith by not acceding to his policy limits demand for teeth damage.

**B. Mr. Jones Suggests on Appeal Additional Acts of Bad Faith Not Raised Below and Not Pertinent to This Lawsuit.**

Mr. Jones repeats on appeal two claims for which he developed no evidence below: that Farmers committed bad faith by not promptly evaluating his claim, and by forcing him into arbitration. (Appellant's Brief, p. 15). He has never explained, either on appeal or before the trial court, how Farmers did not evaluate his claim quickly enough or at what points Farmers took too long to do something. He also has never explained how Farmers supposedly forced him into arbitration when he never demanded anything less than the full policy limits. This Court will not consider bare allegations of wrongdoing not backed up by any evidence or reasoning. *American Fork City v. Smith*, 2011 WL 247519 at *1 (Utah App.)

Not only does Mr. Jones make bald accusations of bad faith against Farmers without elaborating on the accusations, he uses this appeal to suggest different ways a hypothetical insurer could act unreasonably toward a hypothetical insured beyond just denying a claim that is not fairly debatable. His second issue on appeal is whether an insurer who denies a fairly debatable claim should still face bad faith liability if it has treated the insured unfairly in other ways. (Appellant's Brief, p. 2). The problem with

this issue is that it is not germane to this case and to what actually occurred between Farmers and Mr. Jones. His bad faith claim to the trial court centered upon Farmers' denial of his policy limits demand for his teeth damage claim. Mr. Jones is improperly trying to use this case to push for an expansion of bad faith behavior under Utah law.

Mr. Jones imagines various ways in which an insurer who denied a fairly debatable claim should still be liable for bad faith, none of which occurred in this case. "As an example," he postulates, "suppose an insurer has not investigated a claim at all, or has done so halfheartedly." (Appellant's Brief, p. 26). Nonetheless, Mr. Jones did not maintain below, and could not maintain below, that Farmers engaged in no investigation or a lackadaisical investigation of his claim. It is therefore not a proper issue for appeal. *American Fork City*, 2011 WL 247519 at *1. His next hypothetical situation involves an insurer concluding its investigation, letting two years go by, then denying the claim. (Appellant's Brief, p. 27). Again, Mr. Jones never argued to the trial court, nor could he, that Farmers did that with his claim. Another theoretical situation he conjures is an instance where it "might be disputed whether the insurer reasonably relied on an expert." (Appellant's Brief, p. 27). Mr. Jones never disputed whether Farmers reasonably relied on an expert at the time it denied his claim; to the contrary, he argued that Farmers did not hire its own expert and did not rely on his expert's blanket statement on causation. Finally, he wonders whether it would be fair for a hypothetical insurance company to question an insured or the insured's doctor without explaining why it is skeptical; a jury could view this as the insurer treating its insured as an insurance expert, rather than a

layperson. (Appellant's Brief, p. 27). He did not assert to the trial court that Farmers failed to treat him as a layperson or failed to explain the basis for its denial fully enough.

This appeal is not the appropriate place for this Court to consider Mr. Jones' request for a vast enlargement of what constitutes bad faith conduct. His argument to the trial court was that Farmers committed bad faith by denying his claim when it was not fairly debatable. His argument on appeal must be limited to that.

### C. The "Fairly Debatable" Defense Is a Complete Defense to a Bad Faith Claim.

What Mr. Jones calls the *Beck* duties—to diligently investigate the facts to determine whether a claim is valid, to evaluate the claim fairly, and to act promptly in rejecting or settling the claim—are considered part of an insurer's "implied obligation of good faith performance." *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 801 (Utah 1985). If an insurer breaches any of these duties, it is a complete defense to a bad faith lawsuit that the insurer denied a fairly debatable claim. *Billings*, 918 P.2d at 465. "The fairly debatable defense eliminates claims of bad faith, therefore, the Court need not find that all implied obligations were met before the Defendant is eligible for this defense, as the defense would then be meaningless." *Trujillo*, 2010 WL 1901774 at *3.

By contending that an insurer should still be at risk for bad faith liability even if it has denied a fairly debatable claim, Mr. Jones is asking this Court to create new law. He is effectively asking this Court to overrule *Beck*, *Billings* and subsequent Utah cases applying the fairly debatable doctrine. This case is not the appropriate forum for such an upheaval, because this is simply a case where the insured argued to the trial court that its

insurer committed bad faith by denying his demand for policy limits. It is not a case where the insurer engaged in a long course of unseemly and oppressive tactics designed to beat down its insured. This case is not anything like the hypotheticals that Mr. Jones imagines might warrant a reexamination of the fairly debatable doctrine as a complete defense to a bad faith lawsuit.

## CONCLUSION AND RELIEF REQUESTED

Mr. Jones cannot show that Farmers had no reasonable basis to deny his claim when he had no credible evidence that his teeth damage were caused by the accident, and when he suddenly complained of this injury four years after the accident without mentioning it to his various other medical providers. Farmers asks this Court to affirm the trial court's grant of summary judgment in its favor.

DATED this 15th day of August, 2011.

SNOW, CHRISTENSEN & MARTINEAU

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15 day of August, 2011, I caused a true and correct copy of the foregoing **BRIEF OF APPELLEE** to be delivered by electronic mail to the following counsel:

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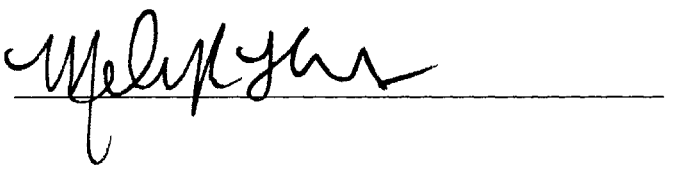

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